IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-809

THOMAS BRENNAN, *et al., Petitioners,*

vs.

KEVIN ARMSTRONG, *et al., Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LLOYD A. BARBEE
BARBEE AND GOLDBERG
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorney for Named Respondents

IRVIN B. CHARNE
CHARNE, GLASSNER, TEHAN, CLANCY & TAITELMAN S.C.
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorney for Absent Members of Respondent Classes

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OPINIONS BELOW

The two district court orders referred to in the last sentence of the opinions below section of the petition (Pet. 2)[1] are not before this Court for review. Petitioners have never appealed from these orders. The court of appeals' decision which petitioners request this Court to review affirmed a district court order entered several months prior to these two orders.

QUESTIONS PRESENTED

Respondents do not accept petitioners' statement of the questions presented. (Pet. 2-3). Petitioners' first two questions, which deal with segregative intent, are each

[1] As used in this brief, the abbreviation "Pet." refers to the petition for a writ of certiorari. The abbreviation "A." refers to petitioners' appendix to that petition.

stated in terms of selective findings of fact instead of the entire factual basis from which both courts below found segregative intent. These two questions are subsumed by respondents' first restated question. Petitioners' third question is improperly stated because it refers to remedial standards which have not been presented to the court of appeals for review.

Respondents' restatement of the issues discussed in the petition is as follows:

1. Did the court of appeals err in affirming the district court's finding that petitioners engaged in practices with the intent and for the purpose of maintaining a segregated school system?

2. Did the court of appeals err in affirming the district court's finding that the school system as a whole was segregated in fact?

3. Did the court of appeals err by applying the clearly erroneous standard to review the district court's finding of segregative intent?

STATEMENT OF THE CASE

This is a school desegregation suit involving the Milwaukee Public School System. The suit's procedural history is adequately described in petitioners' statement of the case. (Pet. 6-7). Aside from this, petitioners' statement of the case is unacceptable. It is largely argumentative and distorts the basis for the lower courts' decisions. It also contains a selective and incomplete presentation of the facts found by the courts below.

Omitted from petitioners' statement is a description of the racial concentration of students and teachers within

the Milwaukee Public School System. The courts below found that thirty-five percent of the system's students were black. (A. 2-3, 41). Of these black students, 80% attended majority black schools and over 75% attended schools that were 80% or more black. (A. 3). Approximately 19% of the elementary schools were over 90% black, and 59% were less than 10% black. Over 30% of the junior high schools were 67-100% black, and of these two-thirds were more than 90% black. Over 50% of the junior high schools were less than 10% black. Only 27% of the system's high school students were black. Eight of fifteen high schools were less than 10% black, and two were over 90% black. (A. 3, 12, 108, 109).

Black teachers comprised approximately 800, or 15%, of the system's 5700-5800 teachers. (A. 12, 73). Eighty percent of the black elementary school teachers taught in schools with black pupil percentages of over 80%, and more than 70% of the black secondary school teachers were assigned to secondary schools having black pupil percentages of over 80%. (A. 12). During the year preceding trial, only 24 black elementary school teachers and 24 black secondary school teachers were assigned to schools attended by a majority of white students. Fifty-six of the system's 129 elementary schools had all-white faculties. (A. 80).

Petitioners' statement also distorts the basis for the lower courts' decisions by incorrectly implying that both courts below found that the mere application of a neighborhood school policy was unconstitutional. (Pet. 11-13). The district court based its finding of segregative intent on numerous actions taken by petitioners over the last 20 years which were intended to and did result in school segregation. (A. 126-130). These decisions included

school site selection, construction of new schools, additions to existing schools, renovation of old schools, redistricting and boundary changes, intact busing, faculty assignment, and transfer policies. (A. 127-128). The court of appeals reexamined these actions and affirmed the trial court's decision. (A. 4-20).

ARGUMENT

I. THE FINDING THAT PETITIONERS ADMINISTERED THE SCHOOL SYSTEM WITH SEGREGATIVE INTENT IS CORRECT, AND FURTHER REVIEW OF THAT FINDING IS UNWARRANTED.

A. Both Lower Courts Found That Petitioners' Actions Were Motivated By Segregative Intent.

One of the elements which must be proved to establish unconstitutional segregation is an intent to segregate. *Keyes v. School District No. 1, Denver,* 413 U.S. 189, 205 (1973). The district court found "that school authorities engaged in practices with the intent and for the purpose of creating and maintaining a segregated school system." (A. 125). Upon review, the court of appeals affirmed this finding. (A. 19-20). This Court, under its two-court rule, should not disturb this finding.

B. The Court Of Appeals Correctly Applied Standards Recently Enunciated By This Court In Affirming The Finding Of Segregative Intent.

Petitioners contend that the court of appeals merely found a racially disproportionate impact in the Mil-

waukee Public School System and, therefore, found only *de facto* segregation. The court of appeals, however, reviewed the district court's findings in light of *Washington v. Davis,* 426 U.S. 229 (1976), and expressly noted that intent to segregate was the differentiating factor between *de jure* and *de facto* segregation. (A. 13). It also acknowledged that if "racial effects were not intended as such but were merely an unavoidable result . . ., they cannot be said to be indicative of segregative intent." (A. 17). The court of appeals did not substitute the existence of a disproportionate impact for segregative intent. Instead, it examined various school board actions in terms of the "totality of relevant facts" test announced in *Washington v. Davis,* (A. 13-19), and held that the district court's finding of segregative intent was not clearly erroneous. (A. 19-20).

Judge Phillip W. Tone was the author of the court of appeals' decision. Two weeks prior to the issuance of its opinion in this case, the court of appeals rendered its decision in *United States v. Bd. of Sch. Com'rs of City of Indianapolis,* 541 F.2d 1211 (7th Cir., 1976), petitions for cert. filed 45 U.S.L.W. 3372-3373 (U.S. Oct. 13 & 14, 1976) (Nos. 76-515, 76-520). Judge Tone dissented in *Indianapolis* because he felt that statistical impact, but not segregative intent, had been proved His dissent, which was based largely on *Washington v. Davis,* discussed at length the legal distinction between discriminatory purpose and discriminatory impact. 541 F.2d at 1224-1229. To assert, as petitioners do, that the court of appeals' reference to *Washington v. Davis* is "rhetoric," (Pet. 17), therefore, is without merit.

C. Both Lower Courts Found That Petitioners' Neighborhood School Policy Was Not Neutrally Applied And That Petitioners Made Segregatorily Motivated Decisions In Areas Unrelated To Their Neighborhood School Policy. Therefore, Petitioners' Adherence To Their Neighborhood School Policy Did Not Preclude A Finding Of Segregative Intent.

Petitioners contend that the district court found a "good faith adherence to a racially neutral neighborhood school policy." (Pet. 17). They further assert that this finding precludes a finding of segregative intent. (Pet. 21). Neither lower court found that petitioners' policy was racially neutral. Each found, instead, a pattern of decision-making imbued with segregative intent.[8] (A. 19-20, 128-131).

1. Both lower courts found that deliberately segregative choices were made within the parameters of Milwaukee's neighborhood school policy.

The Milwaukee neighborhood school policy, as found by both lower courts, was to assign students to schools within a reasonable walking distance of their homes. (A. 4, 43). The parameters of this concept are broad. Within

[8] This finding of intent distinguishes this case from Diaz v. San Jose Unified School District, 412 F. Supp. 310 (N.D. Cal., 1976), appeal docketed, No. 76-2148, 9th Cir., May 24, 1976, cited by petitioners (Pet. 18n.11, 20n.13). In *Diaz*, the district court found that the board applied the neighborhood school policy neutrally because the record disclosed no attempts to gerrymander attendance boundaries or otherwise manipulate attendance areas so as to lock in minorities or freeze segregated school patterns. 412 F. Supp. at 334. In this case, both lower courts found that the neighborhood school policy was not neutrally applied and was used by the school board to "contain" black students. (A. 15-20, 50, 128-131).

the framework of this policy, choices were made as to size of schools, construction of new schools and additions to existing schools, the location of boundaries, and when these choices should be implemented.[9] In examining actions taken by petitioners, the court of appeals noted the flexibility petitioners had in applying their neighborhood school policy. (A. 18).

The district court reviewed actions taken by petitioners within the parameters of their neighborhood school policy and determined that they administered the school system with segregative intent. (A. 129-131). The district court observed that "none of these decisions ever resulted in any noticeable degree of desegregation and practically all of them resulted in greater segregation." (A. 129). The district court also found that petitioners consistently took actions which kept black students from spreading to schools throughout the city. (A. 50). The redistricting of Washington-Marshall high schools was cited as an example of this. (A. 50-51). The district court also pointed to Pierce and Holmes elementary schools as an example of how boundary changes and construction decisions were used to maintain two one-race schools, one predominantly white and one predominantly black, in immediate proximity to each other. (A. 112). A boundary study was also cited by the district court to demonstrate that almost half of the 63 boundary changes studied increased the concentration of black students in ghetto schools, while in the remainder all but one had no effect on racial make-up. (A. 112-113).

[9] Empirical evidence in the record shows that school districts could be as small as seven city blocks or encompass more than 40 city blocks; elementary schools could accommodate as few as 159 students or more than 1,000 students; and schools could have as few as 12 classrooms or as many as 39 classrooms. The record also indicates that a student's "neighborhood school" was not necessarily the closest school to his home.

The court of appeals reexamined petitioners' actions and concurred with the district court's finding of segregative intent. The court of appeals noted that petitioners' neighborhood school policy was flexibly administered, (A. 18), and indicated that there were several instances in the record where petitioners chose the most segregative option when less segregative options were available within the framework of their neighborhood school policy. (A. 18). Like the district court, the court of appeals also gave credence to a boundary study showing that the effect of boundary changes, with few exceptions, either increased racial imbalance or had no effect. (A. 4-6). Moreover, the appellate court stated that these segregative decisions were "attempt[s] to insulate white students from attending schools with large numbers of blacks" and were consistent with testimony from which it could be reasonably inferred that the school board believed that "any large influx of black students into white schools would lower the quality of education available to white students there and would eventually cause them to leave those schools." (A. 15).

2. Both lower courts found that petitioners made deliberately segregative decisions in areas unrelated to their neighborhood school policy.

Petitioners' neighborhood school policy did not govern decisions as to student transfer, faculty assignment or busing. Both lower courts found that these decisions were made with segregative intent. Petitioners' contention that intact busing, open transfer and faculty assignment were racially neutral policies, thus, is contrary to findings made below.

Intact busing consisted of busing students and teachers as an intact class to a school outside of their neighborhood (A. 7, 61). The trial court found that during 1950-1969 pupils involved in intact busing programs because of overcrowding or modernization of their neighborhood schools were returned to their neighborhood schools during lunch time even at times when lunch facilities were available at the school to which they were bused. (A. 65). The court of appeals affirmed this finding. (A. 7).[4] A disproportionately large percentage of intact busing involved students from black schools. (A. 8, 63-66). Moreover, the court of appeals found that intact busing was a method of "quarantining whites from large numbers of blacks who were bused into white schools" and cited this practice as another example of the school board's attempt to insulate white students from attending classes with substantial numbers of black students. (A. 15).

Both lower courts also found that the open transfer policy[5] proved to be a vehicle for white students to transfer out of schools attended largely by blacks to schools attended largely by whites. (A. 16, 69).[6] The court of appeals noted testimony from which it could be inferred that petitioners' refusal to modify this policy was due to their desire not to impede white parents from withdrawing their children from racially mixed schools. (A. 16).

[4] Thus, petitioners' contention that black students involved in intact busing programs mixed with receiving school students during lunch (Pet. 25n.16) is misleading.

[5] The open transfer policy replaced a free transfer system under which the school administration exercised the final decision as to transfers. (A. 8, 67).

[6] Petitioners argue that the district court improperly concluded that the open transfer policy was a substantial cause of segregation because

Both lower courts found that teacher assignments were likewise not entirely made in accordance with racially neutral principles. (A. 17, 125-129). Petitioners attempt to blame teacher racial imbalance on their collective bargaining agreement with the teachers. (Pet. 27-28). However, teacher racial imbalance was found to have existed before petitioners entered into the collective bargaining agreement. (A.17). This agreement, moreover, did not govern a significant number of teacher assignments, (A. 10), and the court of appeals stated that it could be inferred that these assignments were not made in accordance with racially neutral principles. (A. 17).

3. Petitioners' pattern of segregative decision-making and their testimony formed an adequate basis for the finding of segregative intent made by both lower courts.

From the totality of petitioners' actions, the district court properly found segregative intent. The district court stated:

> In and of itself, any one act or practice may not indicate a segregative intent, but when considered together and over an extended period of time, they do. These acts, previously described in detail, constitute a consistent and deliberate policy of racial isolation and segregation for a period of 20 years. (A. 126).

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the evidence showed that racial percentages in many schools were improved by the use of open transfers. (Pet. 29). The district court's finding was that the 1972 study of open transfers revealed that this program played a significant part in producing racial imbalance at the secondary school level, contributed to the increase in black student concentration in at least six secondary schools, and facilitated the flight of white students from black schools at a point in time preceding a comparable departure of white residents from black neighborhoods. (A. 111). With few exceptions, the improvements noted by petitioners were statistically insignificant.

The court of appeals reexamined at length the actions cited by the trial court and affirmed the trial court's finding of segregative intent. (A. 13-20). In affirming this finding, the court of appeals stated:

> Viewing all the evidence, including the statistics showing racial imbalance in the Milwaukee Schools, which is one factor the court may consider in determining whether *de jure* segregation exists, . . . we conclude that the District Court was not clearly erroneous in finding that defendants acted with the intent of maintaining racial isolation. While arguably no individual act carried unmistakable signs of racial purpose, it was not unreasonable to find a pattern clear enough to give rise to a permissible inference of segregative intent. (A. 19-20).

This pattern of decision-making was consistent with evidence from which, as the court of appeals noted,

> . . . it can be inferred that the prevailing belief of the Board was that any large influx of black students into white schools would lower the quality of education available to white students there and would eventually cause them to leave those schools. A natural consequence of this belief, the District Court could properly find, was to attempt to insulate white students from attending schools with large numbers of blacks. *The court could properly infer from the record a connection between this belief and such actions as transferring white residential blocks from black schools to schools with a higher percentage of whites, allowing white students to transfer out of black schools, and intact busing, quarantining whites from large numbers of blacks who were bused into white schools.* (A. 15). [emphasis supplied]

Thus, both courts below found segregative intent based on the totality of evidence presented during the 30-day trial before the district court. Further review of this factual determination is not warranted.

D. The Method Employed By Both Lower Courts In Finding Segregative Intent Was Consistent With That Utilized In Other Northern School Desegregation Cases.

The lower courts' finding of segregative intent from a pattern of decision-making is consistent with the method employed in other northern school desegregation cases.[7] In these cases courts based their findings of segregative intent on school officials' actions regarding boundary changes, school sitings, faculty assignments, and transfer policies. Thus, this is a typical northern desegregation case.

Petitioners' contention that the court of appeals' decision in this case is inconsistent with the court of appeals' earlier decision in *Bell v. School City of Gary, Indiana,* 324 F.2d 209 (7th Cir., 1963), *cert. denied* 377 U.S. 924 (1964), (Pet. 18-20), is erroneous. In *Bell,* the district court examined various actions taken by Gary school officials and specifically found that they were made without an intent to segregate. *Bell,* 213 F.Supp. 819, 826 (N.D. Ind., 1963). The court of appeals in *Bell* reexamined these actions and concurred with the trial court. 324 F.2d at 213. In the instant case, however, both lo ver courts examined various school board actions and specifically found that they were taken with an intent to segregate.

[7] *See* Davis v. School District of City of Pontiac, Inc., 443 F.2d 573, 576 (6th Cir., 1971), cert. denied 404 U.S. 913 (1972); United States vs. Board of Sch. Com'rs of Indianapolis, 474 F.2d 81, 84 (7th Cir., 1973), cert. denied 413 U.S. 920 (1973); Morgan v. Kerrigan, 509 F.2d 580, 592 (1st Cir., 1974), cert. denied 421 U.S. 963 (1975); and Oliver v. Michigan State Board of Education, 508 F.2d 178, 183 (6th Cir., 1974), cert. denied 421 U.S. 963 (1975).

E. The Conflict Among The Circuits Asserted By Petitioners Is Illusory And, In Any Event, Does Not Affect This Case.

Petitioners assert that there is a conflict among the circuits as to the meaning of the words "purpose or intent to segregate." (Pet. 15). A reading of the petition, however, indicates that the asserted conflict is not as to the definition of segregative intent. The claimed conflict concerns whether the foreseeability doctrine can be employed in proving that intent. (Pet. 15-17).

The foreseeability doctrine essentially provides that intent *may* be inferred from the foreseeable consequences of consciously consummated acts. This inference is not conclusive and may be rebutted. Although acknowledging that the doctrine has been employed in other desegregation cases, the district court stated:

> In this case, however, I have not had to rely upon such devices. My finding that school authorities intended to and did maintain a segregated school system is based directly upon the empirical evidence in the record. (A. 126).

The court of appeals similarly did not rely on the doctrine, and its opinion does not even mention it. The correctness of the doctrine is, thus, only of academic importance here. It is a false issue in this case. Moreover, the decisions of the six circuits which have relied upon the doctrine in desegregation cases[8] are consistent

[8] United States v. Bd. of Sch. Com'rs of Indianapolis, 474 F.2d 81, 84-85 (7th Cir., 1973), cert. denied 413 U.S. 920 (1973); United States v. School District of Omaha, 521 F.2d 530, 535-536 (8th Cir., 1975), cert. denied 423 U.S. 946 (1975); Oliver v. Michigan State Bd. of Ed., 508 F.2d 178, 182 (6th Cir., 1974), cert. denied 421 U.S. 963 (1975); Hart v. Community School Bd of Ed., N.Y. Sch. Dist. No. 21, 512 F.2d 37, 50-51 (2d Cir., 1975); Morgan v. Kerrigan, 509 F.2d 580, 589 (1st Cir., 1974), cert. denied 421 U.S. 968 (1975); United States v. Texas Education Agency, 532 F.2d 380, 388 (5th Cir., 1976), vacated sub nom. Austin Independent School District v. United States, 45 U.S.L.W. 3413 (U.S., Dec. 6, 1976) (No. 76-200).

with decisions of this Court in other contexts.[9] They are not in conflict with the cases cited by petitioners.[10] The conflict perceived by petitioners is, therefore, illusory.

[9] *See* Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. N.L.R.B., 347 U.S. 17, 45 (1954); Apex Hosiery Co. v. Leader, 310 U.S. 469, 485 (1940); N.L.R.B. v. Great Dane Trailers, 388 U.S. 26, 33 (1967); Cramer v. United States, 325 U.S. 1, 31 (1945); Cox v. Louisiana, 379 U.S. 559, 567 (1965); Allen v. United States, 164 U.S. 492, 496 (1896). *See also* Milliken v. Bradley, 418 U.S. 717, 738n.18 (1974), where this Court approved the district court's findings of unconstitutional segregation in the Detroit School System. The district court's findings as to intent were based on the foreseeability doctrine. Bradley v. Milliken, 338 F.Supp. 582, 587, 592 (E.D. Mich., 1971).

[10] The Ninth Circuit's decisions in Soria v. Oxnard School District Board of Trustees, 488 F.2d 579 (9th Cir., 1973), cert. denied, 416 U.S. 951 (1974); Johnson v. San Francisco Unified School District, 500 F.2d 349 (9th Cir., 1974); and Berkelman v. San Francisco Unified School District, 501 F.2d 1264 (9th Cir., 1974), do not conflict with cases recognizing the foreseeability doctrine. In *Soria,* plaintiffs argued that defendants' segregative intent could be inferred from the foreseeable consequences of defendants' acts. The Ninth Circuit did not reject that proposition. It merely held that when defendants are prepared to introduce evidence showing they did not act with an intent to segregate, there is a disputed issue of material fact that precludes the granting of summary judgment for plaintiffs. 488 F.2d at 585. To have held otherwise would have improperly given conclusive, irrebuttable effect to the inference arising under the foreseeability doctrine. In *Johnson,* the district court treated proof of segregative intent as unnecessary, and the Ninth Circuit therefore reversed and remanded the case for a finding as to segregative intent. 500 F.2d at 351-352. In *Berkelman,* the Ninth Circuit affirmed the trial court's findings that the standards for admission to an academic high school were neither an intentionally discriminatory standard nor a neutral standard applied in a discriminatory manner. 501 F.2d at 1266-1267. This finding was based in part upon the fact that the high school had a "pilot minority admissions program." In effect, both courts in *Johnson,* unlike the courts here, felt that the school board's evidence was more compelling than the case presented by plaintiffs.

Higgins v. Board of Education of City of Grand Rapids, 508 F.2d 779 (6th Cir., 1974), is not inconsistent with the cases recognizing the foreseeability doctrine, including *Oliver,* which was decided by the Sixth Circuit three days after *Higgins.* The panel in *Higgins* recognized that a court may infer segregative intent from all the circumstances. 508 F.2d at 793. It upheld a district court's finding of no intentional segregation because the evidence introduced by the school board, which included various integration programs adopted by it, outweighed plaintiffs' proof and indicated that the board policies were in reality neutral. 508 F.2d at 791, 793.

F. The Presumption Of Consistency Is Not Novel, And Its Use Did Not Result In A Misreading Of The District Court's Decision.

The district court's finding regarding adherence to the neighborhood school policy stated that petitioners had consistently and uniformly adhered to a policy, the essence of which was to "assign students to schools within reasonable geographic distances of the students' residences." (A. 43). Many decisions made by petitioners were unaffected by that policy. *See* pp. 8-10, above. Those decisions affected by the policy still permitted school board discretion so long as the reasonable walking distance requirement was generally followed. *See* pp. 6-8, above. In examining the decisions made by petitioners in areas unrelated to the policy and in reviewing the choices made by them within the parameters of the policy, both courts found a pattern of discriminatory decision-making. *See* pp. 10-11, above. Regarding the district court's findings as to adherence to the neighborhood school policy, the court of appeals stated:

> Reading the neighborhood-school-policy finding just referred to with the other findings, it is apparent that the former were not meant to describe all cases and that the court did not, as defendants contend, find that their challenged actions were entirely motivated by a racially neutral intent to adhere to a neighborhood school policy. (A. 17).

The court then listed specific instances from the record to illustrate its interpretation.

The standard employed by the appellate court in reviewing the trial court's findings is not novel, even though

a new term, presumption of consistency, was used to describe it. Other courts have held that findings should be liberally construed and found consonant with the judgment if the judgment has support in the record.[11] To construe the district court's findings in any other way would do violence to its opinion. Can there be any doubt that the trial judge would state the following if he found, as petitioners assert, that school board actions were racially neutral:

> ... [S]chool authorities constantly alleged throughout this case that certain characteristics of black school children make their separation from other children "reasonably necessary and desirable from an educational point of view." School authorities assert that they never discriminated against black students because of the color of their skin, but that the requirements of "quality" education necessitated the separation of black children, or as school authorities prefer to say, "children from the lower socio-economic groups."
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> The fallacy in the school authorities' reasoning is that they assume that educationally undesirable characteristics are common to all black children and that therefore they are permitted to run a segregated school system. This the law prohibits them from doing. I am not passing on the question of whether or not school authorities can separate school children based on certain behavioral or attitudinal characteristics, but in any event that is not what the Milwaukee school authorities did. They did not separate the high achievers from the low achievers, the non-

[11] *See* Manning v. Jones, 349 F.2d 992, 996 (8th Cir., 1965); Gilbert v. Sterrett, 509 F.2d 1389, 1393 (5th Cir., 1975), cert. denied 423 U.S. 951 (1975); Freeman v. Gould Special Dist. of Lincoln County, 405 F.2d 1153, 1156 (8th Cir., 1969); Blumenthal v. U.S., 306 F.2d 16, 17-18 (3rd Cir., 1962).

> delinquent from the delinquent, the manageable from the unmanageable, the passive from the violent, and the good from the bad. They just simply separated most of the blacks from most of the whites, and that they may not do under our Constitution, even if it results, on the average, in a better education for everyone. (A. 132-134).

II. THE FINDING THAT THE SCHOOL SYSTEM WAS SEGREGATED IN FACT IS CORRECT.

Petitioners contend that the lower courts failed to find segregation in fact because the district court did not find any school to be segregated as defined in *Keyes*. (Pet. 29-30). In determining if segregation exists, the trial court is required to take into consideration student and faculty racial composition and community and administration attitudes toward schools. 413 U.S. at 196. *Keyes* did not indicate that each of these elements is indispensable to a finding of segregation. What is or is not a segregated school, *Keyes* noted, depends on the facts of each case. 413 U.S. at 196.

The trial court here found that the Milwaukee school system as a whole was segregated, (A. 130), and the court of appeals affirmed. (A. 12). In finding that the entire system was segregated, the trial court cited statistical evidence and made findings as to the student and faculty racial composition of the system's schools. (A. 79-80, 108-109). These statistical findings, the court of appeals stated, were sufficient to support the trial court's finding of segregation in fact. (A. 12). These findings are similar to those made by other courts in determining the

existence of segregation in fact."[12] Moreover, other findings made by the district court in this case, when reasonably construed with findings as to racial composition, support the inference that school officials and the community perceived schools as being either black or white. The findings that white students living in black school districts used the open transfer system to attend white schools, (A. 16, 69), indicates that the community perceived schools as being either black or white. Petitioners' efforts to keep students separated by race further demonstrates that school officials thought of schools in terms of black and white. The record also contains petitioners' own statement of policy, which shows their perception of inner city schools as being black:

> To grasp with deep understanding and staunch purpose the basic fact that the hope of short and long term accomplishments for central city *Negro* schools lies in massive compensatory education. . . . [emphasis added].

III. THE CLEARLY ERRONEOUS STANDARD OF REVIEW IS IN ACCORDANCE WITH PRINCIPLES ANNOUNCED BY THIS COURT.

The court of appeals applied the clearly erroneous standard in reviewing the district court's finding of segregative intent. (A. 13). In doing so, the appeals court

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[12] *See,* for example, Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143 (W.D. Mich., 1973), aff'd sub nom. Oliver v. Michigan State Bd. of Ed., 508 F.2d 178 (6th Cir., 1974), cert. denied 421 U.S. 963 (1975); and Morgan v. Hennigan, 379 F.Supp. 410 (D. Mass., 1974), aff'd sub nom. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir., 1974), cert. denied 421 U.S. 963 (1975).

reexamined school board actions and testimony which the trial court found evidenced that intent, (A. 126-130), determined that the trial judge's reliance on these factors was permissible, and concluded that the finding of segregative intent was not clearly erroneous. (A. 14-20). This standard of review is in accord with Rule 52 (a), Fed. R. Civ. P., and well-established appellate principles. *See United States v. United States Gypsum Co.,* 333 U.S. 364, 394-395 (1948), and *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969). This standard is peculiarly appropriate for reviewing a finding of intent. *United States v. Yellow Cab Co.,* 338 U.S. 338, 341-342 (1949). Morover, its use is consistent with the "salutary principle" stated in recent civil rights actions "that great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances." *Mayor of City of Phila. v. Education Equality League,* 415 U.S. 605, 621n.20 (1974), and *White v. Register,* 412 U.S. 755, 769-770 (1973).

IV. THE IMPLEMENTATION OF A REMEDY IN THIS CASE HAS NOT DENIED PETITIONERS THEIR APPEAL RIGHTS.

The petition states:

> The deprivation of more than cursory appellate review in cases like the instant one by imposing immediate relief should not be condoned. Meaningful appeal is denied if limited in any way because a remedy is in process. (Pet. 34).

In making this statement, petitioners have indirectly accused the court of appeals of ignoring their appellate rights. If petitioners have evidence on which they base

this aspersion, they should bring it forth and directly make their accusation. If not, they should refrain from reliance on innuendo. In this case, which relates to liability only, petitioners were given a full and fair appeal. The court of appeals did not deny petitioners their appellate rights; it merely rejected the merits of their appeal. The implementation of a remedy did not affect the appellate court's affirmance of liability.[13]

Petitioners' assertion that a reversal of the court of appeals' decision will have little effect on Milwaukee's desegregation program, (Pet. 35), is similarly unwarranted. This assertion is not only beyond the scope of this appeal and outside the record on appeal; it is also contradicted by the record before the district court on development of a remedy. In support of their assertion, petitioners state:

> Prior to the District Court's decision on liability, the Board initiated development of a voluntary integration program based upon educational incentives. The Board adopted a "Statement on Education and Human Rights" on September 2, 1975. (Pet. 35).

In reference to this voluntary integration program, Dr. John A. Gronouski, the special master appointed by the district court stated in his report to the court that "[i]n short, the School Board, while giving lip service to a September Voluntary Integration Plan, refused to provide the Superintendent with the means of carrying it out." (Special Master's

[13] Petitioners' reference to 20 U.S.C. §1752, (Pet. 34n.21), is misplaced since this case arises under the Fourteenth Amendment of the Constitution. *See* 20 U.S.C. §1702(b) and Brinkman v. Gilligan, 518 F.2d 853, 856 (6th Cir., 1975), petition for cert. filed 45 U.S.L.W. 3390 (U.S., Oct. 18, 1976) (No. 76-539). As to the propriety of implementing a desegregation remedy prior to exhaustion of all appellate rights, *see generally* Keyes v. School District No. 1, Denver, 396 U.S. 1215 (1969).

Progress Report, May 24, 1976, at p. 4). Later, at a hearing before the district court on the proposed plans for desegregation, the special master added:

> My deepest concern, and Milwaukee's most serious dilemma, is the wholly negative attitude of the bare majority presently in control of the School Board. It has adamently [sic] refused to countenance any significant positive movements towards developing a meaningful integration plan, or towards implementing the largely voluntary interim plan contained in my May 24 progress report. (Transcript of Proceedings, June 9, 1976, at p. 6).

At that same hearing, the district judge directed petitioners to submit a new plan and, in doing so, referred to the plan proposed by petitioners pursuant to their September statement:

> I think it is only fair, since I am going to put this back — send this back to the Board, I think it is only fair that I state that I think, right or wrong, that this Court's view that the present plan, whatever that is, is really no plan at all except it's kind of a hope. Now that may not be right. I'm not asking you to agree with the Court, but you might as well know that I don't think that that plan, after they rejected Dr. McMurrin's [the Superintendent of Schools'] Plan and came up with what your client [petitioners] calls a plan, that doesn't offer any hope or expectation of resulting in any significant form or identifiable form of desegregation in September. And, under the Constitution, this Court could not accept such a plan. So we can spend two or three days belaboring the point, but I think your client is entitled to know, right or wrong, what the judge's view is of that. . . . (Transcript of Proceedings, June 9, 1976, at p. 44).

The implementation of a remedy should not affect the appellate rights of either petitioners or respondents.

Contrary to petitioners' assertion, however, the record in this matter indicates that judicial supervision, rather than petitioners' "Statement on Education and Human Rights," is required to vindicate the constitutional rights found violated by both lower courts.

CONCLUSION

This is a typical northern school desegregation case. Petitioners' invocation of their neighborhood school policy as a cover for their intentionally segregatory decision-making is not a meritorious defense, for this Court has mandated that lower courts indict "evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" *Cooper v. Aaron,* 358 U.S. 1, 17 (1958). The court of appeals and the district court fulfilled this mandate and found that respondents proved the three elements of *de jure* segregation. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

Lloyd A. Barbee
Barbee and Goldberg
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorney for Named Respondents

Irvin B. Charne
Charne, Glassner, Tehan,
Clancy & Taitelman, s.c.
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorney for Absent Members of Respondent Classes